

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

STEVEN GOMO, et al.,
Plaintiffs,
v.
NETAPP, INC.,
Defendant

Case No. 17-cv-02990-BLF

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

[Re: ECF 9]

Plaintiffs are former employees of Defendant NetApp, Inc. who participated in NetApp’s Executive Medical Retirement Plan (“Plan”), a welfare benefit plan governed by ERISA.¹ The Plan, which was offered only to top executives, provided “lifetime” medical benefits for the executives and their families. NetApp amended the Plan in 2016 to eliminate the lifetime benefits provision. Plaintiffs claim that NetApp lacked authority to amend the Plan and they seek a determination that they are entitled to lifetime benefits under the Plan. Alternatively, Plaintiffs claim that NetApp breached its fiduciary duties by misrepresenting the terms of the Plan.

NetApp moves to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6).

The motion is DENIED for the reasons discussed below.

I. BACKGROUND²

Plaintiffs Steven Gomo, Richard Clifton, Edward Deenihan, Daniel Warmenhoven, Robert Salmon, Tom Gerstenberger, and Tom Georgens all held senior executive positions at NetApp at the Executive Vice President level or above. Compl. at p.1, ECF 1. In approximately 2005, NetApp created the Plan as a special incentive for senior executives to continue working for

¹ Employee Retirement Income Security Act of 1974.

² The background facts are drawn from Plaintiffs' factual allegations, which are accepted as true for purposes of evaluating NetApp's motion to dismiss. See *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011).

1 NetApp. *Id.* One of the chief benefits of the Plan was the promise of “lifetime” medical benefits
2 for the executives, their spouses, and their children under the age of twenty-six. *Id.* at p.2.

3 NetApp was both the Plan sponsor and the Plan administrator, and therefore it was a
4 fiduciary of the Plan under ERISA. Compl. ¶ 1. NetApp gave several of the Plaintiffs a
5 PowerPoint presentation regarding the Plan when they became eligible to participate and all
6 Plaintiffs were given a copy of the PowerPoint presentation slides as the Plan document. *Id.* ¶¶ 2-
7 8. Versions of the PowerPoint presentation dated August 2009, February 2012, March 2013, and
8 December 2015 are attached as exhibits to the complaint. Compl. Exhs. 1-4. Those documents
9 explain the eligibility requirements and benefits of the “Executive Medical Retirement Plan” in
10 bullet point form. *Id.* Nothing in those documents indicates that NetApp had authority to
11 terminate the lifetime benefit provision, and NetApp never advised any of the Plaintiffs that the
12 Plan could be modified to eliminate that provision. Compl. ¶¶ 2-8 & Exhs. 1-4. To the contrary,
13 NetApp representatives orally informed several of the Plaintiffs that the Plan provided lifetime
14 benefits. Compl. ¶ 10.

15 In the summer of 2016, NetApp decided to eliminate the lifetime benefit. Compl. ¶ 13.
16 NetApp instead offered Plan participants a reimbursement of costs for insurance plans individually
17 procured by each Plaintiff for a period of three years, and then a lump sum payment nominally
18 equivalent to insurance costs for an additional two years. *Id.* Plaintiffs, through counsel,
19 requested that NetApp provide any plan language permitting it to terminate the lifetime benefit.
20 *Id.* ¶ 14. NetApp failed to provide any plan documents in effect at any time before 2016 showing
21 that NetApp had reserved the right to terminate the Plan or to amend it to eliminate the lifetime
22 benefit. *Id.* NetApp instead produced certificates of insurance which referred to the “Retiree
23 Medical Plan,” which Plaintiffs understand to be a plan separate from the “Executive Medical
24 Retirement Plan” in which they were participants. *Id.* ¶ 15. Plaintiffs made a demand, through
25 counsel, that NetApp continue the preexisting Executive Medical Retirement Plan. *Id.* ¶ 16.
26 NetApp denied that demand. *Id.*

27 Plaintiffs filed this action on May 24, 2017, asserting two claims under ERISA: (1) a
28 claim for benefits and clarification as to entitlement to future benefits under ERISA section

1 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and (2) a claim for breach of fiduciary duty under
2 ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Plaintiffs seek all benefits due under the Plan prior to
3 its amendment (Claim 1) or, alternatively, equitable relief including estoppel and/or plan
4 reformation (Claim 2).

5 **II. LEGAL STANDARD**

6 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a
7 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation*
8 *Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d
9 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts
10 as true all well-pled factual allegations and construes them in the light most favorable to the
11 plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the
12 Court need not “accept as true allegations that contradict matters properly subject to judicial
13 notice” or “allegations that are merely conclusory, unwarranted deductions of fact, or
14 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)
15 (internal quotation marks and citations omitted). While a complaint need not contain detailed
16 factual allegations, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to
17 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
18 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it “allows the
19 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

20 **III. DISCUSSION**

21 **A. Claim 1 for Benefits under the Plan**

22 In Claim 1, asserted under ERISA § 502(a)(1)(B), Plaintiffs seek all benefits due under the
23 Plan prior to its amendment, specifically including lifetime medical benefits. Defendants move to
24 dismiss Claim 1 on the basis that the operative Plan documents contain a reservation of rights
25 permitting NetApp to amend or terminate the Plan.

26 “ERISA was enacted in 1974 to govern the administration of two kinds of employee
27 benefit plans: welfare benefit plans and pension benefit plans.” *Pisciotta v. Teledyne Indus., Inc.*,
28 91 F.3d 1326, 1329 (9th Cir. 1996). “Any plan or fund or program which an employer establishes

1 or maintains for the purpose of providing medical, surgical or hospital care or benefits to its
2 participants or their beneficiaries is defined by ERISA as a welfare benefit plan.” *Id.* Unlike
3 pension benefit plans, welfare benefit plans are not subject to the statutory vesting requirements of
4 ERISA. *Id.* 1330. Consequently, employers generally retain discretion to modify or terminate
5 welfare benefit plans. *Id.*; *see also Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1441 (9th Cir. 1995)
6 (“Because benefits under a welfare plan are generally neither vested nor accrued, an employer
7 may amend or terminate benefits pursuant to the terms of the plan at any time.”). “It is accepted,
8 however, that the parties may themselves set out by agreement or by private design, as set out in
9 plan documents, whether retiree welfare benefits vest, or whether they may be terminated.”
10 *Cinelli*, 61 F.3d at 1441 (internal quotation marks and citation omitted). “A contractual agreement
11 for vesting of benefits must be found in the plan documents.” *Id.*

12 NetApp asserts that the PowerPoint presentation slides which are attached to the complaint
13 and alleged to be the “plan document” are not actually the plan document. NetApp submits 973
14 pages of documents, consisting of multiple certificates of coverage and multiple group insurance
15 policies, which NetApp contends constitute the governing plan documents. *See Kang Decl. &*
16 *Exhs. A-K*, ECF 10. According to NetApp, those governing plan documents contain an express
17 reservation of rights permitting NetApp to amend or terminate the Plan. The case law is clear that
18 such a reservation of rights forecloses a claim for contractually vested benefits. *See, e.g.,*
19 *Pisciotta*, 91 F.3d at 1331.

20 The problem with NetApp’s argument is that it depends on evidence extrinsic to the
21 complaint. “In ruling on a 12(b)(6) motion, a court may generally consider only allegations
22 contained in the pleadings, exhibits attached to the complaint, and matters properly subject to
23 judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). NetApp urges the
24 Court to consider its evidence under the incorporation by reference doctrine. That doctrine allows
25 a court to “consider documents in situations where the complaint necessarily relies upon a
26 document or the contents of the document are alleged in a complaint, the document’s authenticity
27 is not in question and there are no disputed issues as to the document’s relevance.” *Coto*
28 *Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). To the extent any of the documents

submitted by NetApp are referenced in the complaint, the complaint expressly alleges that the documents do not relate to the Plan at issue. Compl. ¶ 15. Moreover, Plaintiffs do not concede the documents' authenticity, pointing out in the opposition brief that the documents are simply presented as attachments to the declaration of NetApp's counsel, who offers no foundation for her ability to authenticate them. Nor do Plaintiffs concede that the documents are, in fact, the governing plan documents. Consequently, the Court cannot consider the documents submitted by NetApp under the incorporation by reference doctrine.

The parties devote substantial argument to the issues of which documents govern and whether various documents satisfy ERISA's statutory requirements. These arguments present factual questions which are inappropriate for resolution on a motion to dismiss.

Accordingly, NetApp's motion to dismiss Claim 1 is DENIED.

B. Claim 2 for Breach of Fiduciary Duty

In Claim 2, asserted under ERISA § 502(a)(3), Plaintiffs claim that NetApp breached its fiduciary duties “[b]y falsely representing the nature of benefits to be provided by [the Plan] if, in fact, they were not lifetime benefits but were subject to amendment or cancellation at the whim of the employer, NetApp.” Compl. ¶ 24. Plaintiffs seek equitable relief for this alleged breach, including estoppel, injunctive relief, and/or reformation of the Plan. *Id.* ¶¶ 25-27. NetApp seeks dismissal of Claim 2 on the grounds that it is duplicative of Claim 1 and fails to state a claim.

1. Duplicative

As noted above, Claim 1 is asserted under ERISA § 502(a)(1)(B), which permits a plan participant or beneficiary to bring suit “to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” 29 U.S.C. § 1132(a)(1)(B). Claim 2 is asserted under ERISA § 502(a)(3), which authorizes a civil action “by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.” 29 U.S.C. § 1132(a)(3). “Section 502(a)(3) has been called a catchall provision, a safety net, offering appropriate equitable relief for injuries caused by

1 violations that § 502 does not elsewhere adequately remedy.” *Bush v. Liberty Life Assurance Co.*
2 *of Boston*, 77 F. Supp. 3d 900, 908 (N.D. Cal. 2015) (internal quotation marks and citation
3 omitted).

4 “At the pleading stage, a plaintiff may assert section (a)(1)(B) and (a)(3) claims in the
5 alternative if they are premised upon different theories of liability and plaintiff seeks alternative
6 remedies. *Bush*, 77 F. Supp. 3d at 908. Here, Plaintiffs seek lifetime benefits under the Plan
7 pursuant to § (a)(1)(B) and, alternatively, they seek reformation or other equitable relief pursuant
8 to § (a)(3) in the event they are not entitled to lifetime benefits under the terms of the Plan.
9 Reformation, one of the remedies sought under the § (a)(3) claim, is not available as a remedy
10 under § (a)(1)(B). Accordingly, the Court concludes that at this early stage of the proceedings
11 Plaintiffs may pursue alternative theories under Claims 1 and Claim 2. See *Bush*, 777 F. Supp. 3d
12 at 908 (denying motion to dismiss § 502(a)(3) claim based on alleged miscommunication of plan
13 terms as duplicative of § 502(a)(1)(B) claim).

14 **2. Failure to State a Claim**

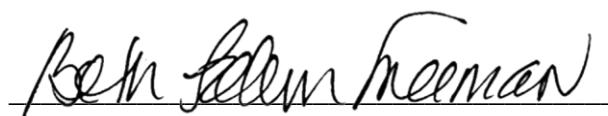
15 NetApp next argues that Claim 2 fails to state a claim because Plaintiffs’ allegation that
16 NetApp promised them lifetime medical benefits is contradicted by the unambiguous written
17 terms of the Plan. See, e.g., *Harris v. Ventyx Inc.*, No. CIV. S-11-308 FCD, 2011 WL 3584498, at
18 *4 (E.D. Cal. Aug. 12, 2011) (“[C]ourts have held the oral agreements or modifications cannot be
19 used to contradict or supersede the written terms of an ERISA plan.”). This argument depends on
20 the Court’s acceptance of the documents submitted by NetApp as the governing plan documents.
21 As discussed above, the Court cannot consider those documents at this stage of the proceedings.

22 Accordingly, NetApp’s motion to dismiss Claim 2 is DENIED.

23 **IV. ORDER**

24 Defendant’s motion to dismiss is DENIED.

25
26 Dated: November 1, 2017
27


28
BETH LABSON FREEMAN
United States District Judge